

0

United States District Court  
Central District of California

ALMONT AMBULATORY SURGERY  
CENTER, LLC, *et al.*,

## Plaintiffs,

V

UNITEDHEALTH GROUP, INC., *et al.*,  
Defendants.

## Defendants

UNITED HEALTHCARE SERVICES,  
INC., *et al.*,

## Counterclaim Plaintiffs.

V

ALMONT AMBULATORY SURGERY  
CENTER, LLC, *et al.*,

## Counterclaim Defendants.

Case № 2:14-cv-03053-MWF (AFMx)

**ORDER (1) DENYING JULIAN OMIDI'S MOTION TO DISQUALIFY JUDGE MICHAEL FITZGERALD [256], (2) DENYING OMIDI'S APPLICATION TO FILE ASSOCIATED EXHIBITS UNDER SEAL [255], AND (3) SETTING AN OSC RE: SANCTIONS AGAINST ROBERT J. RICE, ESO.**

## I. INTRODUCTION

2        This litigation began in Los Angeles Superior Court on March 21, 2014 when  
3 Plaintiffs filed a Complaint for alleged violations of section 17200 of the California  
4 Business & Professions Code, breach of implied-in-fact contracts, recovery of services  
5 rendered, equitable estoppel, and declaratory relief. (Dkt. No. 1.) On April 21, 2014,  
6 Defendants UnitedHealth Group, Inc., United Healthcare Services, Inc., and others  
7 (collectively, “United”) removed this action to federal court. (*Id.*) On May 15, 2014,  
8 United filed a Counterclaim, adding several Counterclaim Defendants, including  
9 Michael Omidi, M.D. and Kambiz Benjamin Omidi a.k.a. Julian Omidi (collectively,  
10 “the Omidis”). (Dkt. No. 25.) United amended the Counterclaim on September 3,  
11 2014 to include allegations that the Omidis conspired to defraud the public and United  
12 out of millions of dollars in payments for unnecessary or never-provided medical  
13 procedures, or for procedures not covered by United’s contracts. (First Am.  
14 Countercl. ¶¶ 62, 68, Dkt. No. 45.)

15 It is apparent that there is a parallel criminal investigation into this alleged  
16 fraudulent practice by the U.S. government, evidenced by the fact that Magistrate  
17 Judge Victor Kenton issued a seizure warrant directed toward one of the parties in this  
18 action. (See, e.g., Dkt. No. 97, pp. 17–20.) This criminal investigation has provided  
19 the impetus for the instant motion to disqualify Judge Fitzgerald.

## II. LEGAL STANDARD

21 Motions for disqualification are governed by 28 U.S.C. § 144 and 28 U.S.C. §  
22 455. *See Pesnell v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008). Under 28 U.S.C.  
23 section 144, if a party demonstrates that “the judge before whom the matter is pending  
24 has a personal bias or prejudice either against him or in favor of any adverse party,  
25 such judge shall proceed no further therein . . . .” 28 U.S.C. § 144. Under 28 U.S.C.  
26 section 455, a judge should disqualify himself from “any proceeding in which his  
27 impartiality might reasonably be questioned.” *Id.* § 455(a). Moreover, section 144  
28 requires that a motion made thereunder be determined by a judge other than “the judge

1 before whom the matter is pending.” *Id.* § 144. Section 455 makes no such  
2 requirement, but as is customary in this District, all motions for disqualification are  
3 referred to another district judge in the same division. C.D. Cal. General Order 14-03  
4 at 16.

5 Under both recusal statutes, the substantive standard is whether a reasonable  
6 person with knowledge of all the facts would conclude that the judge’s impartiality  
7 might reasonably be questioned. *Pesnell*, 543 F.3d at 1043. To require recusal, a  
8 judge’s partiality must usually be based on information obtained outside the judicial  
9 process, or based upon a predisposition developed outside the judicial process. *Liteky*  
10 *v. United States*, 510 U.S. 540, 553–54 (1994).

### 11                   **III. PURPORTED GROUNDS FOR RECUSAL**

12                   As best as this Court can ascertain from their tortured reasoning, the Omidis  
13 planned to file a motion to disqualify the U. S. Attorney’s Office (“USAO”) from this  
14 civil case for purported violations of 26 U.S.C. section 6103. (*See* Mot. for Recusal,  
15 Declaration of Robert J. Rice (“Rice Decl.”) ¶13, Dkt. No. 256.) Because of these  
16 alleged violations, the Omidis argue that, “the United States Attorney’s Office’s  
17 interest and, that of Patrick Fitzgerald, is to avoid any and all citations for the  
18 violations by a court.” (*Id.*) Implied, though not specifically stated, unless Judge  
19 Fitzgerald issued a ruling on the motion against the U.S. government—thereby  
20 bringing discredit to the USAO, and by extension Patrick Fitzgerald—he could have  
21 only reached this decision by failing to consider the motion fairly on its merits. (*See*  
22 *id.* ¶¶ 13–16.)

23                   First, there is no such motion currently on file or before Judge Fitzgerald,  
24 therefore there is no evidence that he would not be able to fairly and impartially  
25 discharge his duties. (*See* Dkt. No. 262.) Moreover, there may never be such a  
26 motion making discussion of recusal or disqualification premature. *See In re Drexel*  
27 *Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (“[W]here an interest is  
28 not direct, but is remote, contingent, or speculative, it is not the kind of interest which

1 reasonably brings into question a judge's impartiality."); *United States v. Bennett*, No.  
2 SACR 03-0025(B) AHS, 2008 WL 2116581, at \*1 (C.D. Cal. May 14, 2008) ("The  
3 possibility of bias must be real and demonstrable, rather than 'remote, contingent,  
4 indirect, or speculative.'").

5 Second, such a motion would be utterly without merit. No Assistant United  
6 States Attorney is handling this civil case, therefore a motion to disqualify the USAO  
7 would be subject to summary dismissal as ill-conceived. *See, e.g., Reddy v. Webmedx*,  
8 No. CV 12-2406-CAS(JCx), 2012 WL 4056256, at \*1 (C.D. Cal. Sep. 12, 2012).

9 **A. The Instant Motion is Wholly Frivolous**

10 Counterclaim Defendant Julian Omidi nevertheless continues in his attempt to  
11 disqualify Judge Fitzgerald. On January 22, 2016, the Court responded to the recusal  
12 motion, stating,

13 The Motion for Recusal is based on this Court's twin  
14 brother, Patrick Fitzgerald being the First Assistant United  
15 States Attorney in this District. Mr. Fitzgerald became the  
16 First Assistant on August 3, 2015. Prior to his elevation,  
17 Patrick Fitzgerald served as Chief of the National Security  
18 Section with no supervisory responsibility over any United  
19 States Attorneys who have appeared in this action.  
20 According to Mr. Rice, and as the record makes clear, the  
United States Attorney's Office is conducting a criminal  
investigation of Mr. Omidi and his brother, Dr. Michael  
Omidi.

21 (Civil Mins., p. 1, Dkt. No. 258.)

22 From the information contained both in the Minute Order by the Court and in  
23 the Opposition to the Motion for Recusal filed by United, it is obvious that there have  
24 been material omissions from the moving papers. Further, when one considers the  
25 February 1, 2016 letter from AUSA Evan J. Davis to counsel for Counterclaim-  
26 Defendant Omidi, Robert J. Rice, it is clear that the continued prosecution of this  
27 motion is not in good faith. The omissions were not merely inadvertent, but were  
28 apparently designed to mislead this Court. Lastly, the gratuitous inclusion of personal

1 information about Judge Fitzgerald and his twin brother as superfluous exhibits to the  
2 motion suggests a less than benevolent motivation. *See Mertan v. E.R. Squibb &*  
3 *Sons, Inc.*, 581 F. Supp. 751, 752 (C.D. Cal. 1980) (holding that successive and futile  
4 motions suggested bad-faith litigiousness by counsel).

5 For the sake of accuracy, this Court will liberally quote the facts as set forth in  
6 Judge Fitzgerald's Minute Order on January 22, 2016:

7 On January 5, 2015, the Omidis and the corporate  
8 Counterclaim Defendants filed a Motion for an Order: (1)  
9 Releasing to Counterclaim Defendants Only for *In Camera*  
10 Review Affidavits Filed Under Seal in Support of Warrants;  
11 or (2) in the Alternative, Recusing Magistrate Judge.  
12 ("Motion for *In Camera* Review" (Docket No. 110)).  
13 . . .

14 On January 15, 2015, the government filed its  
15 Unopposed Ex Parte Request to Intervene. ("Request to  
16 Intervene" (Docket No. 123)). The basis for the Request to  
17 Intervene was that the government wanted to file an  
18 opposition to the Motion for *In Camera* Review. (*Id.*). The  
19 government stated that its interest in this civil action was to  
20 oppose the unsealing of the search warrant affidavits. (*Id.*).  
21 [Judge Fitzgerald] granted the Request to Intervene that  
22 same day. (*Id.*).

23 Also on January 15, 2015, the government filed its  
24 Opposition to the Motion for *In Camera* Review. (Third  
25 Party United States of America's Opposition to  
26 Counterclaim Defendants' Motion for an Order Releasing to  
27 Counterclaim Defendants Only for *In Camera* Review  
28 Affidavits Filed Under Seal in Support of Warrants (Docket  
No. 122)).  
29 . . .

30 On February 12, 2015, this Court issued its Order  
31 Denying Counterclaim Defendants' Motion for an Order: (1)  
32 Releasing to Counterclaim Defendants Only for *In Camera*  
33 Review Affidavits Filed Under Seal in Support of Warrants;  
34 or (2) in the Alternative, Recusing Magistrate Judge.  
35 (Docket No. 146).

36 (Civil Mins., pp. 2–4, Dkt. No. 258.)

1       The government had accomplished the purpose of its intervention and it made  
2 no further appearances in this action. However, this is the very crux of the motion  
3 now before this Court. Omidi argues that recusal is required for two reasons. First,  
4 Omidi argues recusal is necessary because Judge Fitzgerald failed to disclose conflicts  
5 of interest with First Assistant United States Attorney Patrick Fitzgerald. (Mot. for  
6 Recusal, p. 15, Dkt. No. 256.) Second, Omidi argues recusal is required under  
7 Judicial Conference of the United States Opinions 38-2 and 38-3, which call for a  
8 judge to recuse himself when a relative has supervisory responsibilities over the  
9 attorney handling a case before him. (*Id.*) The Court will address both arguments in  
10 turn.

11       The purported conflict of interest apparently stems from the fact that Judge  
12 Fitzgerald and his brother Patrick hold real estate together. Much fuss is made of the  
13 fact they have not made a point of disclosing this fact. (*See id.* at 10–11.) Nor, as we  
14 might imagine, have they made a public disclosure of the fact that they have fraternal  
15 love for one another. However, the Court does not accept Omidi’s unsupported  
16 conclusion that this alone constitutes an independent basis for recusal. *See Herrington*  
17 *v. Sonoma Cnty.*, 834 F.2d 1488, 1503 (9th Cir. 1987) (noting that 28 U.S.C. §  
18 455(b)(4) requires a judge to disqualify himself where “[h]e knows that he . . . has a  
19 financial interest in the subject matter in the controversy or *in a party to the*  
20 *proceeding*”) (emphasis added).

21       Next, sprinkled throughout Omidi’s Memorandum of Points and Authorities are  
22 the dates of certain events. Conspicuously absent, however, are: (1) the date of the  
23 Order Denying Counterclaim Defendants’ Motion for *In Camera* Review (Dkt. No.  
24 146) and (2) the date Patrick Fitzgerald was appointed First Assistant United States  
25 Attorney. The reason for the omission is obvious. The moving party is attempting to  
26 conceal the fact that the premise of the motion is simply false, while at the same time  
27 stating as fact assertions designed to mislead this Court.

28

1 The government's limited involvement in this civil case was terminated upon  
2 Judge Fitzgerald's Order Denying Counterclaim Defendants' Motion for *In Camera*  
3 Review. That was on February 12, 2015. (*Id.*) Patrick Fitzgerald was not appointed  
4 to First Assistant United States Attorney until August 3, 2015, nearly six months after  
5 any AUSA last appeared in this civil action. (Dkt. No. 258.) Because the government  
6 is not a party to this litigation, there is little to no likelihood of an AUSA handling this  
7 case. And because no AUSA is handling this litigation, there cannot be any AUSAs  
8 handling this case under the supervision of Patrick Fitzgerald. *See Beckman Indus.,*  
9 *Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (finding that intervenors "d[id]  
10 not ask the district court to rule on additional claims or seek to become parties to the  
11 action"); *In re Visa Check/MasterMoney Antitrust Litig.*, 190 F.R.D. 309, 312  
12 (E.D.N.Y. 2000) (permitting the U.S. Department of Justice to intervene for the  
13 limited purpose of modifying a protective order). Consequently, Omidi's citations to  
14 the Opinions of the U.S. Judicial Conference are of no moment. Omidi ultimately  
15 fails to persuade this Court that a reasonable person with knowledge of all of the facts  
16 would conclude that Judge Fitzgerald's impartiality might reasonably be questioned.  
17 *See Pesnell*, 543 F.3d at 1043.

18 **B. The Instant Motion Appears to Violate Rule 11**

19 Federal Rule of Civil Procedure, Rule 11(b) provides:

20 By presenting to the court a pleading, written motion, or  
21 other paper—whether by signing, filing, submitting, or later  
22 advocating it—an attorney or unrepresented party certifies  
23 that to the best of the person's knowledge, information, and  
belief, formed after an inquiry reasonable under the  
circumstances:

24 (1) it is not being presented for any improper purpose,  
25 such as to harass, cause unnecessary delay, or  
needlessly increase in the cost of litigation;  
26 (2) the claims, defenses, and other legal contentions  
are warranted by existing law or by a nonfrivolous  
argument for extending, modifying, or reversing  
existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery .

FED. R. CIV. P. 11(b) (emphasis added).

The record would strongly suggest that the factual contentions are wholly without evidentiary support. And it is difficult for this Court to conclude that this deficiency is merely the result of excusable neglect. *See Maisonville v. F2 America, Inc.*, 902 F.2d 746, 749 (9th Cir. 1990) (upholding Rule 11 sanctions for factually frivolous motion after opposing counsel sent letter indicating the motion was not supported by the record).

Perhaps what is more distressing is that the February 1, 2016 letter from AUSA Evan J. Davis unequivocally states that the government is not a party in the civil action and had “intervened as a third party exclusively to oppose an effort by the Omidis to unseal a search warrant affidavit.” (Dkt. No. 268-2.) Mr. Davis goes on to observe that, “the issue was resolved in the government’s favor about a year ago,” and that, “Rice is now using the government’s year-old participation in the civil case as a pretext to seek disqualification of Judge Fitzgerald.” (*Id.*) Davis further states that the government will not be filing an opposition to the recusal motion because it is **not a party** to the civil case. (*Id.*) Before providing the factual basis for his conclusion that the recusal motion is without merit, Davis notes: “[W]e believe the motion is not well-founded and ignores facts known to attorney Rice that render the motion frivolous.” (*Id.*)

Equally distressing to this Court is the failure of Mr. Rice to meet and confer as required by Local Rule 7-3, as well as the decision by Rice to attach to his motion superfluous, **unredacted** public records pertaining to Judge Fitzgerald and his brother, Patrick Fitzgerald. (*Id.*) The inclusion of these records violates Local Rule 5.2-1 as they contain unredacted information regarding the addresses of property the brothers have purchased. (*See* C.D. Cal. R. 5.2-1.) Given the factual record and the baseless

1 nature of this motion, the Court can divine no legitimate, non-malicious purpose for  
2 this act. *See Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537  
3 (9th Cir. 1986) (noting Rule 11 sanctions are warranted when judicial procedures are  
4 used “as a weapon for personal or economic harassment”); *Greenberg v. Sala*, 822  
5 F.2d 882, 885 (9th Cir. 1987) (same). However, Mr. Rice will be afforded an  
6 opportunity to educate this Court and show cause as to why he should not be  
7 sanctioned for:

- 8 1. Bringing and continuing to prosecute this meritless motion in the face of clear  
9 evidence that the basis for the motion was false, i.e., Patrick Fitzgerald was not  
10 supervising any AUSA assigned to handle the instant civil case because there is  
11 no AUSA assigned to handle this litigation.
- 12 2. Failing to meet and confer as required by Local Rule 7-3, prior to bringing the  
13 motion; and
- 14 3. Attaching unredacted documents containing information about the addresses of  
15 the First Assistant United States Attorney and a district judge to the motion  
16 under consideration in violation of Local Rule 5.2-1.

#### 17 IV. CONCLUSION

18 The motion for disqualification (recusal) and the application to file associated  
19 exhibits under seal is **DENIED**. The fact that Judge Fitzgerald’s brother became the  
20 First Assistant United States Attorney six months after the USAO last made a special  
21 appearance in this case, solely to preserve the integrity of an on-going criminal  
22 investigation, is of no consequence. The government is not now, nor is it likely to  
23 become, a party in this litigation. Therefore, any concern about the trial judge’s  
24 brother having supervisory responsibilities over an AUSA handling this case is  
25 misplaced at best. In short, the argument that a conflict of interest exists requiring  
26 Judge Fitzgerald to recuse himself is specious.

27  
28

1        Robert J. Rice, Esq. is ordered to show cause in writing to this Court no later  
2 than March 4, 2016, as to why monetary sanctions should not be imposed for the  
3 conduct discussed above.

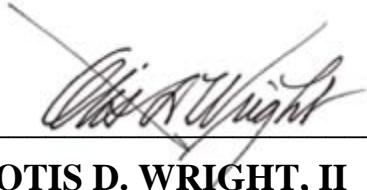
4

5 **IT IS SO ORDERED.**

6

7        February 23, 2016

8

  
**OTIS D. WRIGHT, II**

9        **UNITED STATES DISTRICT JUDGE**

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28